FILED
U.S. Bankruptcy Appellate Panel of the Tenth Circuit

August 21, 2002

Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE CURTIS WESLEY GARRETT and JANET LAVERNE GARRETT, Debtors.	BAP No. WO-02-027
CURTIS WESLEY GARRETT and JANET LAVERNE GARRETT, Plaintiffs – Appellants, v. NEBHELP, INC., Defendant – Appellee.	Bankr. No. 97-17953-BH Adv. No. 01-1283-BH Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court for the Western District of Oklahoma

Before PUSATERI, CLARK, and CORDOVA, Bankruptcy Judges.

PUSATERI, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Debtors Curtis Wesley and Janet Laverne Garrett ("the Debtors") appeal the bankruptcy court's decision denying them a discharge of their student loan debts on the basis of "undue hardship" under 11 U.S.C. § 523(a)(8). After a careful review of the

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

record on appeal, we conclude that decision should be affirmed.

Background

The Debtors filed a Chapter 7 bankruptcy petition in 1997. They then owed about $29,500 in federally guaranteed student loans ("the Debts"), payable in monthly installments of about $260. They had made some payments on the Debts, but none after December 1996. The Debtors filed an adversary complaint seeking to discharge the Debts, but it was dismissed in 1998 without a dischargeability ruling.

On October 1, 2001, the Debtors filed another complaint seeking to discharge the Debts. By that time, the Debts were all held by defendant NEBHELP, Inc. ("the Defendant"). The matter was tried in March 2002, and, due to interest, the Debts had grown to about $44,500 by then.

The evidence presented at trial detailed the Debtors' financial situation. Most of the evidence concerned 2001, but between 1997 and 2002, the Debtors had borrowed around $6,000 from Mr. Garrett's parents, and had reduced the debt to about $3,300 by March 2002. The Debtors have one child, and reported that the family's living expenses for all of 2001 totaled about $41,000. While both Mrs. Garrett and her son have medical conditions that generate ongoing expenses, the 2001 expense total included the family's out-of-pocket medical expenses for that year.

Mr. Garrett works as police officer, bringing home net pay (as calculated by the bankruptcy court) of about $21,000 per year.[1] Mrs. Garrett is a schoolteacher. Her take-home pay for 2001 was about $22,000 (the figure the bankruptcy court used in reaching its decision), as shown on her last pay stub for 2001. Her medical conditions cause her to miss work fairly often, and after she exhausts her sick leave (as she has done at times), her pay is docked for any additional time she misses. However, her

[1] One page of Exhibit 14 admitted at trial shows that Mr. Garrett's take-home pay for all of 2001 was actually about $23,500. Other pages of the exhibit indicate his take-home pay for the first two pay periods in 2002 was somewhat higher than it had been for many of the 2001 pay periods shown in the exhibit, but about the same or somewhat lower than for some other 2001 pay periods.

2001 pay stubs appear to show reductions in her pay for the times when this happened during that year, and the Debtors did not present evidence to quantify specifically how much pay she might have lost in 2002 up to the time of trial. Although these take-home pay figures actually add up to $43,000, the bankruptcy court used $42,000 as the Debtors' net pay for 2001 when it made its oral ruling at trial. In addition to the income shown by their pay stubs, the Debtors also received state and federal tax refunds every year from 1995 through 2000, and from 1997 forward, the refunds were over $2,000 per year. In making its ruling, the bankruptcy court added $2,000 to the $42,000 net pay figure, and used $44,000 as the Debtors' total annual receipts available to pay their living expenses.

The bankruptcy court found that certain expenses the Debtors listed for 2001 were not necessary for a minimal standard of living. Although Mr. Garrett apparently obtained two cell phones under a special program with the police department where he worked, he testified that his job did not require him to have a cell phone. The bankruptcy court determined that the $1,370 the Debtors spent for the phones could instead be applied to the Debts. The court also determined that $1,020 the Debtors paid for martial arts training for Mrs. Garrett and their son was not necessary, and could be applied to the Debts.

There was some question at trial just how much the Debtors would have to pay monthly on the Debts. Ultimately, however, the Debtors' attorney agreed with the bankruptcy court that $260 per month is what the Defendant would require them to pay, and the court used this figure—annualized to $3,120—in reaching its decision.

So, taking the $3,000 difference between its finding of $44,000 in available income and the Debtors' reported expenses of $41,000, and adding the $1,370 and $1,020 for the expenses it ruled were not necessary (for a total of $5,390), the bankruptcy court concluded that the Debtors could pay $3,120 per year on the Debts and still have roughly $2,200 left over for other expenses. The court ruled that the

Debts were not dischargeable because the Debtors could maintain a minimal standard of living for their family with their current income and expenses even if forced to repay the Debts. The Debtors then filed this appeal.

Discussion

Student loan debts like those the Debtors owe are not dischargeable in bankruptcy "unless excepting such debt from discharge . . . will impose an undue hardship on the debtor and the debtor's dependents."[2] In what has become the leading case interpreting what "undue hardship" means, *Brunner v. New York State Higher Education Services Corp. (In re Brunner)*,[3] a district court judge formulated a three-part test that was then approved by the Second Circuit on appeal. The test has been adopted by the Third, Seventh, and Ninth Circuits.[4] The bankruptcy court applied that test in this case, and the Debtors do not question the propriety of doing so.

Under *Brunner*, to obtain a discharge of student loans on the ground of undue hardship, a debtor must show:

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.[5]

The *Brunner* test requires us to review under the clearly erroneous standard the

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[2] 11 U.S.C. § 523(a)(8).

[3] 46 B.R. 752, 756 (S.D.N.Y. 1985), *aff'd* 831 F.2d 395 (2d Cir. 1987) (*per curiam*).

[4] *Pennsylvania Higher Educ. Assistance Agency v. Faish (In re Faish)*, 72 F.3d 298, 306 (3d Cir. 1995), *cert. denied*, 518 U.S. 1009 (1996); *In re Roberson*, 999 F.2d 1132, 1134-37 (7th Cir. 1993); *United Student Aid Funds, Inc. v. Pena (In re Pena)*, 155 F.3d 1108, 1110-12 (9th Cir. 1998). In ruling that a debtor couple had satisfied any standard for undue hardship that might be applied, the Sixth Circuit quoted the *Brunner* test, but did not expressly adopt it as the standard that must be applied in resolving an undue hardship question. *Cheesman v. Tennessee Student Assistance Corp. (In re Cheesman)*, 25 F.3d 356, 359-60 (6th Cir. 1994).

[5] 831 F.2d at 396.

bankruptcy court's resolution of any factual disputes that are relevant to the test, although we must then review under the *de novo* standard its ultimate conclusion whether an "undue hardship" has been shown.[6] Here, the bankruptcy court applied only the first part of the *Brunner* test because it found the Debtors failed that part, making the Debts nondischargeable. The Tenth Circuit has explained the clearly erroneous standard of review this way:

> A finding of fact is clearly erroneous only if the court has "the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948). "It is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data." *Krasnov v. Dinan*, 465 F.2d 1298, 1302 (3d Cir. 1972).[7]

The Debtors devote one paragraph of their brief to questioning the bankruptcy court's conclusion that they are able to maintain a minimal standard of living even if they are forced to repay the Debts. They argue that they discharged most of their other debts in 1997, that they have not bought a new vehicle or furniture since then, that they have not taken major vacations, and that they do not have any lavish expenses, but they still had to borrow money from Mr. Garrett's parents to cover their living expenses. However, to the extent the bankruptcy court made any errors in calculating the Debtors' ability to pay, it favored the Debtors by somewhat understating their net income for 2001. Furthermore, the court simply accepted the greatest part of the Debtors' own report of their 2001 expenses. The Debtors simply cannot complain about this much of the court's ruling. The court's only factual determination against the Debtors' position was its finding that their expenses for cell phones and martial arts training were

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[6] In *Woodcock v. Chemical Bank (In re Woodcock)*, 45 F.3d 363, 367-68 (10th Cir.), *cert. denied* 516 U.S. 828 (1995), the Tenth Circuit stated that whether student loans are dischargeable because of undue hardship was a question of law to be reviewed de novo.

[7] *Gillman v. Scientific Research Prods., Inc. (In re Mama D'Angelo, Inc.)*, 55 F.3d 552, 555 (10th Cir. 1995).

unnecessary. We are not left with a "definite and firm conviction" that the bankruptcy court erred in making this finding.

Despite ruling largely in the Debtors' favor about their income and expenses, the bankruptcy court found that the Debtors have enough income to pay the Debts as well as their remaining expenses, and still have more than $2,000 per year left over. Although the bankruptcy court did not mention the debt to Mr. Garrett's parents, the $2,000 excess under its generous calculation would permit them to repay Mr. Garrett's parents within two years. Reviewing the question *de novo*, we are convinced that the fact the Debtors incurred another debt that they are able to repay even while maintaining a minimal standard of living and repaying the Debts does not establish that they satisfy the first part of the *Brunner* test. In short, the evidence presented at trial indicated that the Debtors can maintain a minimal standard of living even if they must repay both the Debts and their debt to Mr. Garrett's parents.

Conclusion

The bankruptcy court correctly determined that the Debtors failed to show that excepting the Debts from their discharge would impose an undue hardship on them and their son. The bankruptcy court's judgment is affirmed.